Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment	CS Docket No. 95-184
In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring	MM Docket No. 92-260

COMMENTS

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September 25, 1997

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

Section 624(i) of the Communications Act requires the FCC to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises of such subscriber.*" In its August 28, 1997 Further Notice of Proposed Rulemaking in this docket, the Commission proposes to subject home run wiring in MDUs — wiring in common areas *outside* the premises of the subscriber — to rules that would require the incumbent operator to transfer ownership of that wiring upon the termination of service.

The Commission recognizes that the text of the statute and its legislative history do not authorize rules affecting such wiring, and relies instead on its general rulemaking authority under Title I. The courts have repeatedly held, however, that the agency's power to enact "necessary" rules cannot overcome explicit, carefully limited statutory grants of authority, such as that in Section 624(i). Moreover, the courts will give the FCC little deference when it relies on its general authority to enact rules, such as these, that implicate the Takings Clause of the U.S. Constitution.

The Commission presumes that landlords and other MDU owners will act in the interests of their tenants. The presumption contradicts real-world experience. For decades, state laws have recognized and met the need to protect tenants. As the Commission knows, many states have enacted laws specifically designed to limit landlord control over the delivery of multichannel video service in MDUs. Cases show that MDU owners have a powerful incentive to place their own economic interests above the best interests of tenants. The Commission should

acknowledge this history and recognize the incentive for landlords to maximize their revenues without regard to tenant interests.

If the FCC is intent on looking past this history, it should take steps to minimize those incentives and to protect tenants. At a minimum, the proposed home run wiring rules should not apply if the MDU owner receives or demands any form of compensation from an MVPD for the right to provide service in the building or otherwise for the right to operate. Such a rule would follow the lead of the several states that have laws prohibiting any landlord or MDU owner from taking or demanding any payment for access. It would allow those owners who put tenants' interests first to expedite the availability of home run wiring for alternative providers. The Commission should also decline to adopt any federal presumption as to landlords or MVPDs acting as the agent for tenants in terminating the incumbent's service. The Commission need only to look to its recent experiences with telephone slamming to understand the dangers of such an agency.

The Commission should fully implement its stated intention not to alter any rights that might exist under state statute, contract, easement or common law by avoiding any presumption that the incumbent has no right to remain on the MDU premises. The presumption itself operates to skew the rights of incumbent providers by encouraging MDU owners to assume they have power to terminate service. Incumbent operators have rights not only in states with access statutes, but also under service agreements and common law. In fact, it is not uncommon for an operator to have both a service agreement for a term of years ***and*** a separate easement that is not limited in duration.

The FCC has no expertise in these often arcane areas of law, and should permit the incumbent to rely on its rights, and to defend them in court before the home run wiring rules work to abrogate those rights. To that end, the FCC should allow the incumbent to stay the application of the proposed rules by giving the MDU owner notice of intent to seek judicial determination of rights, and to file an action to protect those rights. A stay would fulfill the FCC's goal of leaving rights under state law intact.

In the same way, the FCC should not adopt any presumption with respect to incumbent operators' rights in conduit and molding used to provide service. This type of property, if owned or under contract for use by the incumbent, is no less protected by state and constitutional law than a plot of land. Exclusive agreements for the use such property are not *per se* undesirable, as the Commission has concluded in similar contexts.

The marketplace should be left intact to determine ownership of wiring installed in MDUs in the future. MDU owners have shown ample ability to bargain for the things they value, and the record is devoid of any suggestion that they need a federal rule to alter the marketplace. The practice of negotiation over ownership of MDU wiring should be free of any FCC overlay.

Finally, the Commission should make sure that its home run wiring procedures, if adopted, account for real world considerations. The FCC should adopt a default price for wiring, on a per unit basis, to assure that incumbents are fully compensated, and that MDU owners and MVPDs do not realize a windfall. If the potential buyer refuses to purchase the wiring, then the incumbent should retain ownership. And to easily eliminate some disputes in the implementation of the rules, the FCC should require that all notices under the rules be in writing.

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("Joint Commenters") hereby submit these Comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. THE COMMISSION LACKS AUTHORITY TO IMPLEMENT ANY RULE THAT REQUIRES THE FORFEITURE OF HOME RUN WIRING

A. Section 624(i) Limits Commission Authority to Regulating Disposition of Wiring Within the Premises of a Subscriber (¶¶ 63 - 64).

Any analysis of the Commission's authority must begin with the statutory language itself. In Section 624(i), Congress directed the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises of such subscriber.*"[2] The Commission, through its previous statements in this proceeding and its invocation of general rulemaking powers, apparently agrees that home run wiring is not within the "premises of any subscriber" as that phrase is used in Section 624(i). This should be the end of the inquiry. The legislative history only makes the meaning of the statute more clear.

Congress, after meeting in conference, adopted the House provision on inside wiring.[3] The House Report, interpreting the provision ultimately adopted, directs that:

> This provision applies only to internal wiring contained within the home and does not apply to any of the cable operator's other property located inside the home (e.g., converter boxes, remote control units, etc.) or any wiring, equipment, or property located *outside* of the home or dwelling unit.[4]

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[1] *In the Matter of Telecommunications Services Inside Wiring,* Further Notice of Proposed Rulemaking, CS Docket 95-184, MM Docket 92-260, FCC 97-304 (released August 28, 1997) ("FNPRM").

[2] 47 U.S.C. § 544(i) (emphasis supplied).

[3] H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992)("Conference Report") at 86.

[4] H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) ("House Report") at 118 (emphasis supplied).

Congress expressly limited "the right to acquire home wiring to the cable installed within the *interior premises* of a subscriber's dwelling unit."[5] Congress then explicitly stated its intention that Section 624(i) not affect wiring in MDU common areas:

> This Section deals with internal wiring within a subscriber's home or individual dwelling unit. *In the case of multiple dwelling units, this Section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.*[6]

The home run wiring at issue in the FNPRM falls squarely within the category of MDU wiring that Congress sought to leave unaffected. Yet the FNPRM never mentions this critical passage.

None of the Commission's other claimed sources of authority under Title VI provides the required authority to overcome Section 624(i)'s limitation to wiring within a customer's premises.[7] Title VI does not, as the Commission claims, create a "pervasive regulatory structure Congress established regarding cable communications."[8] The provision of Section 601 on which the FCC relies states in full that one of the purposes of the act is to: "promote competition in cable communications and *minimize unnecessary regulation that would impose an undue economic burden on cable systems.*"[9] The legislative history of the 1992 Cable Television Consumer Protection and Competition Act, as explained above, specifically directs the FCC not to regulate cable wiring in the common areas of MDUs. And the Title VI amendments contained in the Telecommunications Act of 1996 were designed to ***de-regulate*** cable entities so

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[5] *Id.* (emphasis supplied).

[6] *Id.* at 119 (emphasis supplied).

[7] FNPRM at ¶¶ 57 - 60.

[8] FNPRM at ¶ 57.

[9] 47 U.S.C. § 521(6) (emphasis added).

as to promote their ability to provide facilities-based competition to traditional telephone service providers.[10]

Likewise, the FNPRM's reliance on Section 623's rate regulation authority is misplaced. The FCC has already satisfied the statutory mandate with respect to wiring by reducing installation charges to cost. If anything, the amendments to Section 623 in the Telecommunications Act of 1996 indicate that if Congress had any concern over rates in MDU's, it was concerned with rates being too low.[11] Section 623 in any event protects the "subscriber," which is defined to exclude building owners and others who redistribute signals.[12] The Commission's authority to regulate rates under Section 623 cannot be used to evade the limits set by Congress's express provision on inside wiring.[13]

B. The Commission's General Authority to Enact Rules "Necessary" to Its Explicit Duties Does Not Override Express Directives Concerning MDU Wiring.

The courts have repeatedly held that the Commission's general rulemaking authority in Title I and elsewhere in the Communications Act does not provide the FCC with

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[10] *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 301, 303, 110 Stat. 56 (amending 42 U.S.C. § 544A (FCC rules governing consumer equipment should not affect any telecommunications interface equipment or computer network services); 47 U.S.C. § 541(b) (segregating regulation of cable system delivery of video from delivery of telecommunications); 47 U.S.C. § 544(e) (repealing local power to enforce cable technical standards, and affirmatively prohibiting local regulation of any transmission technology or subscriber equipment); 47 U.S.C. § 542(b) (prohibiting any cable franchise fees on telecommunications revenue)).

[11] Congress added a provision in Section 623(d) to ensure that a cable system not subject to effective competition "may not charge predatory prices" to MDUs. Telecommunications Act of 1996 at § 301(b)(2) (amending 47 U.S.C. § 543(d)).

[12] 47 C.F.R. § 76.5(ee).

[13] *See, e.g., Time Warner v. FCC*, 56 F.3d 151, 201 (D.C.Cir. 1995) *cert. denied*, 116 S. Ct. 911 (1996), (the Commission may not evaluate disposition of franchise fees under its broad mandate over basic service rates; "even if the Commission could consider relevant criteria in determining whether a franchising authority can afford to regulate, it could not use those criteria to accomplish indirectly what § 542(i) directly proscribes.")

authority to enact rules that either contradict explicit statutory limitations, or which implicate constitutional limitations. For example, in *California v. FCC*, the court held that the Commission's ancillary rulemaking authority under Title I does not permit preemption of state regulation of enhanced services: "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities."[14]

In *NARUC v FCC*, the court held that the FCC could not use generic Title I authority to preempt state law regulation of two-way point-to-point non-video services offered over cable because: "[T]he allowance of a "wide latitude" in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority."[15] The court held that the FCC lacked the authority it claimed under Section 2(b) of the Communications Act and the Supreme Court's decision in *Louisiana PSC* to preempt state regulation of telephone inside wiring, because the proposed preemption of state law went far beyond the degree needed to create a competitive inside wiring market.[16] In fact, the D.C. Circuit struck down part of the Commission's deregulation of telephone inside wiring in *NARUC III*.[17] The same principle applies to the Commission's claim of authority under Title I to enact its proposed MDU home run wiring rules.

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[14] 905 F.2d 1217, 1240 n. 35 (9th Cir. 1990).

[15] 533 F.2d 601, 612-13, 617 (D.C. Cir. 1976).

[16] *Id.* at 617. The court concluded: "[While] an agency, especially the FCC, is entitled to great deference in the construction of its own statute. . . . we hasten to add that it is not a license to construe statutory language in any manner whatever, to conjure up powers with no clear antecedents in statute or judicial construction, nor to ignore explicit statutory limitations on Commission authority." *Id.* at 618.

[17] *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

In an analogous context, the court in *Bell Atlantic Tel. Cos. v FCC* rejected the FCC's claim that it derived implicit Title II authority to require physical collocation from its explicit power in Section 201 to order carriers "to establish physical connections with other carriers."[18] The court reasoned that *Chevron* deference was unwarranted because physical collocation "directly implicated" the Takings Clause:

> The Commission's power to order "physical connections," undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices. . . . The Commission's decision to mandate physical co-location, therefore, simply amounts to an allocation of property rights quite unrelated to the issue of "physical connection."

The Commission's explicit power under Section 624(i) to enact rules for the disposition of cable wiring inside the subscriber's dwelling likewise does not authorize the proposed rules which effect the transfer of ownership of cable home run wiring that is not located within a subscriber's dwelling unit.

The *MTel* decision[19] does not alter this body of law and allow the Commission to invoke Title I for rulemaking authority where more specific provisions of the statute confer only carefully limited power. In that case the court strongly relied on the fact that the FCC had only changed an agency policy: "The pioneer's preference itself was a creation of the Commission, *not* an act of subservience to a mandate of Congress."[20] Under Congress's authorization for auctions, the FCC could have clearly done away with the preference altogether, so that the less-

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[18] 24 F.3d 1441, 1445-46 (D.C. Cir. 1994).

[19] *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399 (D.C.Cir. 1996), *cert denied,* 117 S. Ct. 81 (1996) ("*MTel*").

[20] *Id.* at 1405.

drastic modification at issue was entirely consistent with the relevant statute.[21] In contrast, the proposed cable inside wiring rules go beyond an explicit statutory limitation on the Commission's jurisdiction, and contradict the only legislative history that directly addresses home run wiring. *MTel* is simply inapplicable.

II. THE FCC HAS NO BASIS TO EVEN TENTATIVELY CONCLUDE THAT LANDLORDS AND OTHER MDU OWNERS WILL PROTECT RESIDENTS' INTERESTS

A. MDU Owners Have Demonstrated That, As "Communications Gatekeepers," They Will Maximize Their Own Profit At The Expense Of Residents' Best Interests.

The Commission acknowledges that "circumstances can exist" where property owners select service providers to suit their own -- not residents' -- interests."[22] Nonetheless, without *any* evidence, the Commission "tentatively concludes" that in competitive real estate markets landlords will not "ignor[e]" their residents' interests.[23] If there were any basis for this tentative conclusion, then state legislation and judicial decisions protecting tenants from their landlords throughout this century have been entirely unnecessary. Pursuant to the Commission's logic, landlords and MDU owners have sufficient independent economic incentive to provide tenants with safe, clean, quiet accommodations at reasonable prices. The Commission need look

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[21] *Id.*

[22] FNPRM at ¶ 47.

[23] FNPRM at ¶¶ 39 and 47. Semantics aside, even if it is concluded that a landlord may not "ignore" residents' interests, it still requires a substantial leap of logic to assume that they will "protect" residents' interests or advance competitive interests.

no further than the competitive real estate market in its own backyard, the District of Columbia, to see that such an assumption is, at best, naive.[24]

Fortunately, state legislatures have not been so blind-sighted and have enacted laws to curb the potential abuses of landlords and MDU owners. Many commercial landlords have deep pockets coupled with sophisticated business acumen, giving them tremendous bargaining power over tenants.[25] In addition to protecting tenants' rights generally, numerous state laws and policies specifically prohibit MDU owners and landlords from receiving kickbacks for tenant services.

Several states have enacted laws restricting landlords' ability to extract payments from cable operators.[26] These laws recognize that landlords have strong economic interests in receiving payments from video service providers that are inconsistent with tenants' interests in obtaining high quality multichannel video services at reasonable prices. In addition, numerous

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[24] *See* Judith Evans, *Ex-Tenants Return as Owners To Refurbished Apartments*, The Washington Post, August 10, 1996 at E1 ("Tenants, most of them El Salvadoran immigrants, lived in squalid conditions [in an apartment house at 1425 T. St. NW] from the mid-1980s until the last residents moved out in 1994. Chunks of plaster fell from the apartment ceilings. Residents used space heaters and stoves to ward off the cold when the building's heating system didn't work. . . . 'There were a lot of holes with rats . . . there were cockroaches everywhere.'").

[25] For example, it was recently reported in the Washington Post that the developer Charles E. Smith Residential Realty Inc., which owns and operates about 14,000 apartment units in buildings throughout the region, agreed to purchase two Arlington County apartments for $155 million. Maryann Haggerty, *Charles Smith Realty Buying 2 Arlington Apartment Towers*, The Washington Post (September 18, 1997) at E-2. *See also, e.g.*, Jim Mitchell, *GE Capital, JPI form partnership; venture to purchase, build luxury apartments*, The Dallas Morning News, Sept. 16, 1997 ("GE Capital Services is investing $470 million in a partnership with Irving based developer JPI to acquire and build thousands of luxury apartments nationwide"); *US apartment giant faces pressure for more big buys*, The Arizona Republic, September 1, 1997 (Equity Residential Properties Trust, the largest United States apartment company, headed by billionaire financier Sam Zell, has $5 billion in assets and 35% annual earnings growth); Fred Vogelstein, *A real estate tycoon for the '90s*, US World and News Report, May 19, 1997, at 52 (Insignia Financial Group manages 270,000 apartment units in 48 states and is the fifth largest manager of commercial properties).

[26] *See* Conn. Gen. Stat. § 16-333a(a) (1994); D.C. Code Ann. § 43-1844.1(a)(2) (1993); Me. Rev. Stat. Ann. tit. 14, § 6041.1(H) (1994); Nev. Rev. Stat. § 711.255(1)(b) (1995); N.J. Stat. Ann. § 48:5A-49(a) (1993); N.Y. Pub. Serv. Law § 228(1)(b) (Consol. 1996); R.I. Gen. Laws § 39-19-10(h) (1994); Va. Code Ann. § 55-248.13:2 (1993); W. Va. Code § 5-18A-5 (1996).

states have passed laws that otherwise are designed to curb MDU owner inclination to restrict tenant access to video service.[27] The Commission cannot ignore the fact that the states have recognized and tried to address these motives.

The facts of *C/R TV Cable, Inc. v. Shannondale, Inc.*, 27 F.3d 104 (4th Cir. 1994) illustrate that deals brokered by developers and MDU owners rarely benefit subscribers.[28] In *C/R TV*, the developer sought to exclude the franchised cable operator from the planned community, despite the residents' desire to retain the cable operators' service. The provider favored by the developer would have charged $30.20 for basic service, while the incumbent operator charged only $17.40.[29] The alternative operator, however, had promised to provide a kickback to the developer.[30] The residents' association wanted access to the franchised cable operator, but the "gatekeeper" developer tried to bar the incumbent from ever entering the subdivision, and pursued trespass charges against the cable operator when invited in by residents.[31] Numerous other cases

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[27] *See* Conn. Gen. Stat. § 16-333a(b) (1994); D.C. Code Ann. § 43-1844.1(a)(1) (1993); 55 Ill. Comp. Stat. 5/5-1096(a) (West 1996) (county franchises); 65 Ill. Comp. Stat. 5/11-42-11.1(a) (West 1993) (municipal franchises); Kan. Stat. Ann. § 58-2553(a)(5) (1994); Me. Rev. Stat. Ann. tit. 14, § 6041.1 (1994); Mass. Ann. Laws ch. 166A, § 22 (Law. Co-op. 1995); Minn. Stat. Ann. § 238.23 (1994); Nev. Rev. Stat. § 711.255 (1995); N.J. Stat. Ann. § 48:5A-49 (1993); N.Y. Pub. Serv. Law § 228(1)(a) (Consol. 1996); N.Y. Exec. Law § 828(1)(a) (Consol. 1994); Pa. Stat. tit. 68, § 250.503-B (1996); R.I. Gen. Laws § 39-19-10 (1994); V.I. Code Ann. tit. 30, § 317 (1996); W. Va. Code § 5-18A-8 (1996); Wis. Stat. § 66.085 (1994).

[28] Although C/R TV involved a planned development, and not an MDU, the developer had the exact same economic incentives as any MDU owner: to exploit its property for the maximum economic benefit of the owner.

[29] *C/R TV Cable, Inc. v. Shannondale, Inc.*, Civ. Action No. 92-0017-M, Plaintiff's Reply Memorandum of Points and Authorities in Support of Its Motion For A Preliminary Injunction at 51 (Apr. 23, 1992).

[30] *C/R TV Cable, Inc. v. Shannondale, Inc.*, 27 F.3d 104 (Jt. App., Vol. II, p. 714).

[31] *C/R TV Cable, Inc. v. Shannondale, Inc., No. 92-17-M* (N.D.W.VA. 1993) (Magistrate's supplemental findings of fact and Recommendation for disposition) at 4.

chronicle landlords' and developers' attempts to craft deals that benefit their own interests to the detriment of tenants.[32]

The FCC should heed these examples, and act to encourage competition for MDU subscribers on merit, rather than on ability to promise the MDU owner the greatest share of revenue. Earlier comments in this proceeding, for example, suggested a multiple-wire solution to the question of MDU service. Record evidence demonstrated that MDUs could be retrofitted with multi-duct conduit, so as to accommodate more than one service provider.[33] These ideas, if enacted, would go a long way toward establishing the competition Congress sought.

B. If the Commission Enacts Its Proposed Rules, It Should Make Them Inapplicable To MDU Home Run Wiring Where the MDU Owner Is Paid For MVPD Access.

If the Commission chooses to enact its proposed rules in spite of the public evidence that MDU owners are sophisticated businesses that place their economic motives ahead of tenant welfare, the Commission should take steps to minimize ill motives, and encourage competition for subscribers based on service and programming quality. The way to accomplish this is to make the rules inapplicable if the MDU owner ever obtains compensation of any type from the MVPD (up-front payment, percentage of revenue, in-kind services such as advertising support). This is what is done in some of the states, where landlords may not receive any form

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[32] *Multichannel TV Cable v. Charlottesville Quality Cable*, No. 93-0073-C (W.D. Va. Dec. 3, 1993), *aff'd*, 22 F.3d 546 (4th Cir. 1994); *Storer Cable TV, Inc. v. Summerwinds Apartments Assoc.*, 493 So. 2d 417 (Fla. 1986); *Waltham Telecommunications v. O'Brien*, 532 N.E.2d 656 (Mass. 1989); *City of Lansing v Edward Rose Realty*, 502 N.W.2d 638 (Mich. 1993); *Centel Cable Television Co. v. Admiral's Cove Associates*, 835 F.2d 1359 (11th Cir. 1988); *UACC-Midwest, Inc. v. Occidental Development, Ltd.*, 1991 US Dist LEXIS 4163 (W.D. Mich. March 29, 1991); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993).

[33] *See* Comments of Guam Cable TV, March 18, 1996, *In the matter of Telecommunications Services Inside Wiring*, Notice of Proposed rulemaking, CS Docket 95-184, FCC 95-504 (rel. Jan. 26, 1996).

of financial compensation, including kickbacks, fee sharing, upfront fees, and other payments, from video providers.[34]

On the other hand, those MDU owners with the best interests of residents in mind will be able to expedite the transfer of service from one provider to another by disavowing any compensation and invoking the FCC rule. The proposed rules would then apply, and the wiring would change hands in accordance with its terms. In this way, the Commission can best fulfill the goals of the 1992 Cable Act, to promote "consumer protection and competition" in cable television,[35] and the marketplace reliance espoused in the 1996 Telecommunications Act.

C. The Commission Should Not Alter State Law of Agency.

If the Commission's proposed rules are adopted, in addition to a condition that the inside wire rules for home run wiring are not triggered if the MDU owner accepts compensation from the MVPD, the Commission should not create a new federal form of agency between landlords and their tenants in terminating cable service.[36] As proposed, the Commission would adopt what amounts to a presumption that encourages landlords to act as agents for their tenants. The FNPRM states that such an arrangement would streamline and expedite the conversion process, and tentatively concludes that proof of agency would not be required.

The Commission should be consistent and adopt a "hands off" policy with respect to creating any implied agency in the same manner that it has avoided creating or abrogating

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[34] *See* Conn. Gen. Stat. § 16-333a(a) (1994); D.C. Code Ann. § 43-1844.1(a)(2) (1993); Me. Rev. Stat. Ann. tit. 14, § 6041.1(H) (1994); Nev. Rev. Stat. § 711.255(1)(b) (1995); N.J. Stat. Ann. § 48:5A-49(a) (1993); N.Y. Pub. Serv. Law § 228(1)(b) (Consol. 1996); R.I. Gen. Laws § 39-19-10(h) (1994); Va. Code Ann. § 55-248.13:2 (1993); W. Va. Code § 5-18A-5 (1996).

[35] The FNPRM focuses almost exclusively on the 1992 Cable Act's goal to increase competition and ignores Congress' equally compelling goal to protect cable consumers.

[36] FNPRM at ¶ 39.

other state laws and rights that may be implicated by the inside wiring rules. Moreover, any potential benefit of such an arrangement is outweighed by subscribers' interests in selecting their own video service provider. As the Commission surely has learned in regulating slamming in the telephone industry, "alternative service providers" are eager and willing to force their service on consumers without permission.[37] Thus, the Commission's unsubstantiated conclusion that slamming is not likely to occur in the video context is simply unbelievable.

III. IF ENACTED, THE PROPOSED RULES SHOULD PERMIT INCUMBENTS TO DEMONSTRATE THEIR RIGHT TO REMAIN ON THE MDU PREMISES PRIOR TO IMPOSITION OF THE HOME RUN WIRING RULES

The FNPRM asserts that the proposed rules "do not grant MDU owners any additional rights, but simply establish a procedural mechanism for MDU owners to enforce rights they already have."[38] The fact is, the proposed rules give MDU owners the right to obtain home run wiring currently owned by the incumbent, a right explicitly denied them by the Commission when it adopted the current rules,[39] and a right Congress specifically directed the FCC to leave unregulated at the federal level.[40] Because the proposed rules provide no procedure for the determination of whether the incumbent has an enforceable right to remain on the MDU premises, MDU owners will have every incentive to challenge that right, and to invoke the FCC's rules that would transfer to them ownership of home run wiring within weeks. If the rights that

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[37] The Commission has stated that it fields more consumer complaints stemming from slamming than from any other issue. C-LEC News (www.clec.com), *FCC seeks to preempt slamming in local-service arena*, July 15, 1997.

[38] FNPRM ¶ 47.

[39] FNPRM at ¶ 10.

[40] *House Report* at 119; *see* Section I.A. above.

incumbent cable providers have under state law to remain on MDU premises are to have any continued validity, the Commission must, at minimum, adopt rules that allows the incumbent to defend its right to remain on the premises ***before*** the rules trigger a transfer of ownership of home run wiring to the MDU owner, and termination of the incumbent's service.

As outlined earlier in these comments, MDU owners and managers have flexed their power as gatekeepers to extract the best economic deals for themselves without regard to either the wishes of residents or the legal rights of the incumbent. MDU owners and other MVPDs have ignored or challenged incumbents' rights to remain on the premises, even in those states that have explicit statutes designed to assure that tenants have the opportunity to receive service.[41] Presumably, had the proposed MDU home run wiring rules been in effect, these same MDU owners and MPVDs would have argued that the incumbent had no "clear" right to remain on the premises, and would have evicted the incumbent before the litigation proved that the incumbent could not be evicted.[42]

There is no legal or empirical reason for a presumption that the incumbent has no right to remain on the premises. Such a presumption ignores the reality reflected in case law. Incumbent providers have been able to enforce their right to remain on the MDU premises under

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[41] *See Continental Cablevision, Inc. v. Miller*, 606 N.E.2d 587 (Ill. App. 1992) (Illinois statute); *Times Mirror Cable Television, Inc. v. First National Bank of Springfield*, 582 N.E.2d 216. (Ill. App. 1992) (Illinois); *American Cablecom Ltd. Partnership v. Cablevision of Pennsylvania, Inc.*, 1994 U.S. Dist. LEXIS 17025 (E.D. Pa. Nov. 22, 1994) (Pennsylvania statute); *AMSAT Cable, Ltd. v. Cablevision of Connecticut Limited Partnership*, 6 F.3d 867 (2d Cir. 1993) (Connecticut law).

[42] If the incumbent is wrongfully forced out by the property owner, the loss of subscribers and goodwill ordinarily will cause irreparable injury. *See, e.g., Cox Cable Communications v. United States*, 774 F. Supp. 633, 638 (M.D. Ga. 1991); *Centel Cable Television Co. v. Burg & Divosta Corp*, 712 F. Supp. 176, 178 (S.D. Fla. 1988). Unless the Commission allows the incumbent to serve residents while the issue is being resolved, courts will be forced to hear innumerable cases for injunctive relief to prevent landlords from prematurely excluding incumbent cable operators.

common law claims such as tortious interference with contractual relations, interference with an irrevocable license, conversion, conspiracy, and through express easements to serve building interiors.[43] Indeed, some incumbents have both a service agreement for a specified term of years ***as well*** as an easement of unlimited duration. In such cases, the operator's contract to serve might not be renewed, yet it would have an enforceable right to remain on the premises, and presumably, every right to maintain ownership of its existing home run wiring.

The Joint Commenters therefore agree with the Commission's general proposal not to alter existing rights under contract, statute or common law.[44] But the Commission should make this proposal meaningful in practice. The FCC should not adopt any presumption or otherwise interfere with the incumbent's enforcement of these rights to remain on MDU premises. The Commission has no experience or expertise in the interpretation of common law and contract rights, and has a long-standing practice of abstaining when asked to rule on such matters.[45] On

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[43] *See, e.g., Power v. Cablevision Investor's, Inc.*, 929 S.W.2d 15 (Tex. App. 1983); *Cox Communications West Texas v. Heartland Wireless-Lubbock, Inc.*, 96-555, 303 (Lubbock County, Tex., April 30, 1996) (reported in *Cable TV Law Reporter*, April 30, 1996 at p. 12); *Polo Club of Boca Raton Property Owners Ass'n v. Tele-Media Co*, CL 93-8621 AB (Palm County, Fla., Cir. Ct. Aug. 18, 1995) (order granting judgment after trial) (reported in *Cable TV Law Reporter*, Aug. 31, 1995, p. 11); *Boca Gardens Homeowners Ass'n v. National Cable Comm.*, CL 92-8103 AI (Palm Beach County Cir. Ct., Feb. 16, 1994) (reported in *Cable TV Law Reporter*, Feb. 28 1994, p. 8); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, CA 93-73-C (W.D. Va. Dec. 16, (preliminary injunction on claims that MDU owner and SMATV provider tortiously interfered with the incumbent's service contracts, conversion, conspiracy, and state landlord tenant act) described in *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 22 F.3d 546 (4th Cir. 1994)).

[44] FNPRM at ¶ 34 ("We are not proposing to preempt an incumbent's ability to rely upon any rights it may have under state law.") and ¶ 76 (". . .[T]his rule should not override a bulk service contract that specifically provides for the disposition of the wiring upon termination.").

[45] *See, e.g., Connecticut Cable Television Association, Inc.*, 4 FCC Rcd 476, 478 (1988); *North American Communications Corp.*, 51 FCC 2d 1171 (1975) at ¶¶ 12 and 13 (Commission will not "interpret the obligations of parties to an existing agreement, or force parties into new contractual relationships"); *Certified Communications, Inc.*, 44 RR2d 708 (1978) at ¶ 4 ("In the licensing of DPLMRS facilities, the Commission does not construe or interpret state law when questions of state certification arise."); *Flower City Broadcasting Co.*, 20 FCC 2d 985 (1970). Indeed, courts have refused to give deference to the Commission's interpretation of state law, citing its lack of expertise in state law issues and/or the absence of express statutory authority. *See, e.g., Cellwave Telephone Services, L.P. v. FCC*, 30 F.3d 1533 (D.C. Cir. 1994).

the other hand, the cases cited here and elsewhere in this proceeding demonstrate that the courts have often addressed these arcane issues.

As a procedural matter, the Joint Commenters also support the proposal of NCTA that the incumbent may stay the application of the FCC's cable inside wiring rules to home run wiring by giving the MDU owner notice of the operator's intent to pursue, and filing for, a judicial determination of its right to remain on the premises and/or to maintain ownership of the wiring under a state statute, contract, or common law. This notice would be given instead of, and at the same time as, the Commission's proposal that the incumbent elect to sell, remove or abandon the wiring. Anything less than a stay would interfere with the ability of incumbent operators to enforce their rights to remain on the premises, and would amount to an abrogation of rights under state statute, contract or common law. A stay pending judicial resolution, however, fulfills the Commission's proposal not to alter rights under existing state laws and contracts.

IV. THE COMMISSION MAY NOT ABROGATE THE INCUMBENTS' PROPERTY OR CONTRACT RIGHTS IN MDU MOLDING AND CONDUIT (¶ 83)

The Commission's tentative conclusion that it may permit alternative providers to use incumbents' conduit and molding without compensation, even when the incumbent has an exclusive contractual right to occupy the molding or conduit,[46] exceeds the Commission's statutory authority and violates the Fifth Amendment takings clause.

The Commission may not permit alternative providers to co-locate their wires in incumbents' conduit and molding. Conduit and molding installed by an incumbent is the property

[46] FNPRM at ¶ 83.

of the incumbent, unless state law renders the conduit and molding a fixture.[47] Forcing an incumbent to share its conduit and molding with an alternative video provider is tantamount to condemnation of the incumbent's property, a power that is not conferred upon the Commission by the Communications Act.[48]

Nor may the Commission permit alternative video providers to use conduit and molding that is not owned by the incumbent in cases where the incumbent has an exclusive contractual right to use the conduit or molding. The Commission lacks statutory authority to abrogate existing contracts between MDU owners or landlords and video providers.[49] When Congress intends to legislate mandatory sharing of existing conduit, it knows how to do so explicitly. It did so in Section 224, which grants telecommunications providers access to utility poles, conduit, and rights of way for a fee capped by a statutory formula implemented by the FCC. Without such authority, the Commission may not promulgate rules that interfere with existing contracts.

Exclusive agreements are widely used and accepted in business and may actually promote competition in certain circumstances. Indeed, the Commission has recognized that

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[47] Most states recognize the trade usage exception to the rule of fixtures. *See, e.g., Interior Energy Corp. v. Alaska State Bank*, 771 P.2d 1352 (Ala. 1989)(kitchen cabinet and sink were trade fixtures and could be removed by tenant); *Neely v. Jacobs*, 673 S.W.2d 705, 707-708 (Tex. App. 1984) (in case of no written agreement, presumption exists that tenant did not intend to donate trade fixtures to landlord); *Standard Oil Co. v. La Cross Super Auto Serv., Inc.*, 258 N.W. 791 (Wisc. 1935); *Prudential Ins. Co. of America v. Kaplan*, 198 A. 68 (Pa. 1938) (bowling alleys found to be trade fixtures); *Royce v. Latshaw*, 62 P. 627 (Colo. App. 1900) (greenhouse and heating apparatus were trade fixtures); *Wolford v. Baxter*, 21 N.W. 744 (Minn. 1884) (brewery equipment was trade fixture); Restatement (Second) of Property (Landlord and Tenant) § 12.2(4) (tenant may remove any permissible annexations so long as the landlord and tenant have not agreed otherwise and freehold may be restored to former condition).

[48] *See Bell Atlantic Telephone Cos. v. F.C.C.*, 24 F.3d at 1445.

[49] *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1302 (D.C. Cir. 1981) ("the Communications Act of 1934 grants the FCC no authority to authorize unilateral changes in agreements").

exclusive programming agreements are often in the public interest and that they do not, standing alone, constitute unfair competition.[50] Exclusive agreements generally are upheld as fair and reasonable in the face of antitrust allegations.[51] There is no reason to abrogate that existing exclusive agreements for incumbents to use conduit and molding.

V. THE COMMISSION SHOULD LEAVE THE FUTURE TREATMENT OF HOME RUN WIRING UPON INSTALLATION TO NEGOTIATION BETWEEN THE PARTIES (¶85).

The Commission should not enact any rule governing disposition of wiring upon installation in the future because the market will dictate the most economically efficient disposition of the wiring in each instance. MDU owners are well-financed, sophisticated businesses, as demonstrated in Section II above. They are represented in their endeavors by capable law firms, who negotiate MDU service agreements just as well as they negotiate deals for the purchase of land, buildings, and the litany of service contracts that allow the landlords to hold out properties for rent.

Moreover, the Commission has no authority to adopt regulations governing MVPD access to MDUs in those states that already have access statutes. It has no power to control those other legislatures which might, in the future, adopt similar legislation. And the

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[50] *See First Report and Order in MM Docket 92-265, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359 (April 30, 1993) at ¶ 63 ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized"). *See also Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Continental Cablevision, Inc. and HBO*, CSR 4690-P, 1997 FCC LEXIS 1361 (March 17, 1997); *American Cable Co. and Jay Copeland v. TeleCable of Columbus, Inc.*, 11 FCC Rcd 10090 (1996).

[51] *See, e.g. Futurevision Cable System v. Multivision Cable TV*, 789 F. Supp. 760, 767 (S.D. Miss. 1992); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077 (D. Colo. 1991), *aff'd*, 964 F.2d 1022 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 601 (1992); *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1036 (5th Cir. 1981).

Commission cannot regulate as to privately negotiated easements, which are commonly addressed in many business arrangements governing video service in MDUs.

A rule that ignores this reality, and forces a cable operator to turn over its property upon installation, is preposterous. There is no real world basis for a presumption that these real estate businesses are incapable of asserting their rights, bargaining for ownership of wiring, or negotiating easements to their buildings. There is also no basis in the law or comments to presume that cable operators should subsidize property owners or competitive providers who do not want to construct their own facilities. The Commission should reject any such rule, and leave the disposition of wiring in future installation to the negotiation of parties, as they have done since the inception of cable television.

VI. PROCEDURAL ISSUES

A. If the Commission Enacts Its Proposed Rules For MDU Home Run Wiring, It Should Also Adopt a Default Price For the Wiring (¶ 37, ¶ 40).

If the Commission persists in its view that MDU landlords and alternative service providers are entitled to purchase home run wiring, and enacts its proposed rules, then the Commission should also adopt a default price for the wiring. A default price that realistically reflects replacement value, including some amount for labor, will minimize the windfall otherwise granted to the MDU owner and/or the MVPD provider, and will eliminate one artificial incentive otherwise created by the proposed rules.

The Joint Commenters support the NCTA's proposal that the Commission establish a default price for wiring on a per-dwelling unit basis. Such a price guarantees that the incumbent will be compensated at least in part for the labor of installation, and will mitigate the

free ride that MDU owners and alternative MVPDs would obtain through avoided costs of replacement. The procedures should provide that, if the incumbent elects to sell rather than abandon or remove its plant, and the MDU owner elects to buy it, the incumbent may elect the FCC default price at any time during the negotiation period in the proposed rules.

To give the operator some meaningful opportunity to sell its wiring, if the potential buyer of the wiring refuses to pay the default price, then the incumbent should retain ownership. Otherwise, the MDU owner would have no motive to buy the wire. The Commission's goal of giving the MDU owner an opportunity to purchase the wiring from the incumbent will be satisfied by the offer. If the MDU owner declines purchase, it would unfairly leave the incumbent operator with no buyer for its valuable property, and saddle it with the economic costs of removal or abandonment, neither of which furthers any identified goal in this proceeding.

State laws governing ownership would be unaffected by this presumption. If the incumbent does not own the wire, or otherwise may not sell it under state law, contract, or common law, then the default price would not apply.

B. Any Notice of Termination Should Be In Writing (¶ 41).

The Commission proposes that, in the unit-by-unit context, subscribers may give their provider notice of termination either orally or in writing. The FNPRM makes no proposal as to the manner of notice in building-by-building contexts. The Joint Commenters propose that any such notice of termination be governed by the terms of any written agreement by the parties, or that it be in writing, in both unit-by-unit and whole-building contexts. It is readily conceivable that the Commission's proposed rules will spawn litigation over multiple issues, including whether valid notice of termination was given.